BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF WILSON M. KRUEGER, JR.	)	C 26 008 438
DOCKET NO. 98-11 982	)	DATE APR 18 2000

On appeal from the
Department of Veterans Affairs Regional office in Milwaukee, Wisconsin

THE ISSUE

Entitlement to an effective date earlier than August 6, 1996, for the grant of service connection for arteriosclerotic heart disease with myocardial infarction, angina and hypertension, including based on a claim of clear and unmistakable error (CUE) in a January 1996 Board decision.

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

John Z. Jones, Counsel

Pl.Exh. No. 1

IN THE APPEAL OF
WILSON M. KRUEGER, JR.

INTRODUCTION

The veteran served on active duty from November 1953 to October 1957, and from November 1957 to May 1974.

This matter has come before the Board of Veterans' Appeals (Board) on appeal from a rating decision of the Milwaukee, Wisconsin, Department of Veterans Affairs (VA) Regional Office (RO).

The Board notes that the veteran is unrepresented in this case as he revoked his prior appointment of the Disabled American veterans by a letter received in September 1999, and has not appointed a new representative.

FINDINGS OF FACT

1. All relevant evidence necessary for an equitable disposition of the veteran's appeal has been obtained.
2. In a January 1996 decision, the Board denied entitlement to service connection for cardiovascular disease, including hypertension, angina and a myocardial infarction.
3. A reopened claim of service connection for a heart disease was received on August 6, 1996.
4. In a June 1997 rating decision, the RO granted service connection for arteriosclerotic heart disease with myocardial infarction, angina and hypertension, evaluated as 60 percent disabling from August 6, 1996.
5. In November 1997, the United States Court of Appeals for Veterans Claims (Court) (formerly known as the United States Court of Veterans Appeal) affirmed the Board's January 1996 decision.

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CONCLUSIONS OF LAW

1. The criteria for an effective date earlier than August 6, 1996, for the grant of service connection for arteriosclerotic heart disease with myocardial infarction, angina and hypertension have not been met. 38 U.S.C.A. §§ 5107, 5110 (West 1991 & Supp. 1999); 38 C.F.R. § 3.400 (1999).
2. There is no legal entitlement under the law for review of the board's January 1996 decision on the basis of CUE. 38 U.S.C.A. § 7111 (West Supp. 1998); 38 C.F.R. § 20.1400 (1999).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

Initially, the Board finds that the veteran's claim is "well-grounded" within the meaning of 38 U.S.C.A. § 5107. The Board is also satisfied that all relevant facts have been properly and sufficiently developed, and that no further assistance to the veteran is required to comply with the statutory duty to assist. 38 U.S.C.A. § 5107.

Factual Background

A historical review of the record shows that a Board decision in January 1996 denied service connection for cardiovascular disease, including hypertension, angina and a myocardial infarction. The evidence of record at that time included the veteran's service medical records, which showed elevated blood pressure readings, as well as post-service private and VA clinical records, which contained diagnoses of unstable angina (April

1992), myocardial infarction (May 1993) and hypertension (May 1993).

On August 6, 1996 the RO received a statement from the veteran's representative which was construed as an attempt to reopen the claim for service connection for cardiovascular disease. Attached was a statement from Dr. D.P., dated June 26, 1999, wherein the physician opined that the veteran's blood pressure had its onset in service.

In a June 1997 rating decision, the RO granted service connection for arteriosclerotic heart disease with myocardial infarction, angina and hypertension, evaluated as 60 percent disabling from August 6, 1996.

In November 1997, the Court affirmed the Board's January 1996 decision.

Pertinent laws and Regulations

A specific claim in the form prescribed by the Secretary must be filed in order for benefits to be paid to any individual under the laws administered by VA.
38 U.S.C.A. § 5101 (a) (West1991); 38 C.F.R. § 3.151(a) (1999).

Pursuant to 38 U.S.C.A. § 7104(b) (West 1991), when a claim is denied by a decision of the Board, the claim may not be considered based upon the same factual basis, except as provided in Section 5108 of Title 38. Under 38 U.S.C.A. § 5108 (West 1991), VA is required to reopen and readjudicate a claim when "new and material evidence" is presented or secured with respect to the claim.

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Except as otherwise provided, the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor. 38 U.S.C.A. § 5110(a). This statutory provision is implemented by regulation which provides that the effective date for compensation will be the date of the receipt of the claim or the date the entitlement arose, whichever is later. 38 C.F.R. § 3.400.

The effective date of an award of disability compensation based upon a claim reopened after final disallowance shall be the dated of receipt of claim or the date entitlement arose, whichever is later. 38 U.S.C.A.§ 5110(i); 38 C.F.R. § 3.400(r).

The effective date of grant of benefits based upon new and material evidence, other than service department records, following final disallowance shall be the date of receipt of the new claim or the date entitlement arose, whichever is later. 38 C.F.R. § 3.400(q)(l)(ii).

The provisions of 38 C.F.R. § 3.155(a) (1999) for informal claims provide that any communication or action, indicating an intent to apply for one or more benefits under the laws administered by the VA, from a claimant, his or her duly authorized representative, a Member of Congress, or some person acting as next friend of a claimant who is not sui juris may be considered an informal claim. Such informal claim must identify the benefit sought. Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution. If received within one year from the date it was sent to the claimant, it will be considered filed as of the date of receipt of the informal claim.

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Analysis

As noted above, the Board denied service connection for cardiovascular disease, including hypertension, angina and a myocardial infarction in January 1996. That decision is final. 38 U.S.C.A. § 7104.

The veteran contends that the effective date for the award of service connection for arteriosclerotic heart disease with myocardial infarction, angina and hypertension should be June 1, 1974, the day following separation from service. Importantly, his contention overlooks the provisions of 38 U.S.C.A. § 5110(a) and 38 C.F.R. § 3.400(q)(l)(ii), which provide that the effective date of the grant of benefits based on new and material evidence following a final disallowance (as in this case, because of the Board's January 1996 decision denying service connection for cardiovascular disease, including hypertension, angina and a myocardial infarction) shall be the date of receipt of the new claim or the date entitlement arose, whichever is later.

The claims file shows that on August 6, 1996, the RO received a statement from the veteran's representative in which he essentially requested reopening of the claim, and a statement from a private physician, dated June 26 1996, wherein the physician rendered an opinion that the veteran's high blood pressure had its onset in service. Based on this evidence, the RO, in June 1997, reopened the claim, based on new and material evidence, and granted service connection and a 60 percent rating for arteriosclerotic heart disease with myocardial infarction, angina and hypertension, effective August 6, 1996. As the January 1996 Board decision denying service connection for cardiovascular disease is final, it follows that service connection for arteriosclerotic heart disease with myocardial infarction, angina and hypertension may only be granted from the date of receipt of the reopened claim. In this case, the veteran's reopened claim for service connection was received on

August 6, 1996. As such, disability compensation may not be paid from a date prior thereto.

In addition, the Board finds no evidence submitted subsequent to its January 1996 denial that would meet the requirements for an informal claim as set forth in 38 C.F.R. § 3.155. Overall, the preponderance of the evidence is negative and against the grant of entitlement to an effective date earlier than August 6, 1996, for the grant of service connection for arteriosclerotic heart disease with myocardial infarction, angina and hypertension. 38 U.S.C.A. § 5107.

The Board notes that the veteran has challenged the board's January 1996 decision on the grounds of CUE. In this regard, the Board notes that pursuant to 38 C.F.R. § 20.1400(b)(l), all final decisions of the Board are subject to review on the basis of an allegation of CUE, except those that have been appealed to and decided by a Court of competent jurisdiction. In plain language, this means that once the Board's decision of January 1996 was subject to review on appeal by the Court, there is no legal entitlement to review of the Board's decision on the basis of CUE. Accordingly, the request to find CUE in the January 1996 Board decision is denied.

ORDER

An effective date earlier than August 6, 1996, for the grant of service connection for arteriosclerotic heart disease with myocardial infarction, angina and hypertension, including based on a claim of CUE in a January 1996 Board decision, is denied

(signed)
U.R. POWELL
Member, Board of Veterans' Appeals

NOTE: Pursuant to Fed, Cir, R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

01-7067

WILSON M. KRUEGER, JR.,

Claimant-Appellant,

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs,

Respondent-Appellee.

DECIDED: NOVEMBER 15, 2001

Before NEWMAN, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and RADER, Circuit Judge.

PER CURIAM

DECISION

The appellant Krueger's appeal from the decision of the Court of Appeals for Veterans

Claims, dismissing as moot his request for extraordinary relief, is dismissed for lack of jurisdiction.

Pl.Exh. No. 2

OPINION

I

Although the facts relating to the various administrative and judicial proceedings Krueger has initiated are somewhat complex. Those necessary to understanding our disposition of this appeal may be summarized briefly.

Following his military service, which ended in May 1974, Krueger unsuccessfully tried to establish service connection for cardiovascular disease. The Board of Veterans Appeals ("Board") rejected that claim in January 1996, and the court of Appeals for Veterans claims ("Veterans Court") upheld the Board's decision. Krueger v. Gober, 96-212, 1997 WL 786993 (Vet. App. Nov. 19, 1997). On Krueger's request, however, the Regional Office of the Department of Veterans Affairs ("Regional Office") reopened the case and awarded him service connection with 60 percent disability effective August 6, 1996 – the date Krueger applied for reopening of his claim. Krueger appealed to the Board, claiming that the effective dated should be June 1, 1974 (the day after his separation from service) and that the Board had committed clear and unmistakable error.

On April 18, 2000, the Board denied Krueger's appeal, ruling that the Regional Office properly had designated August 6, 1996 as the effective date for Krueger's benefits.

In a letter to the Veterans Court, dated July 3, 2000, Krueger attempted to appeal the Board's April 18, 2000 decision. The court returned those materials to Krueger, stating that the Board's 1996 decision had become final and that if Krueger was seeking a change in that decision, based on new evidence, he should submit such evidence to the 01-7067.
Regional Office, and not to the Veterans Court. The court did not refer to the April 18, 2000 Board decision which Krueger was challenging.

Krueger than filed with this court a notice of appeal from the Veterans Court's action. He also again attempted to appeal the Board's decision, sending the Veterans Court a second letter, dated July 28, 2000, which this time the court treated as a timely notice of appeal of the April 18, 2000 Board decision. Krueger did not, however, inform the Veterans court of his notice of

appeal to this court, or this court of his second letter to the Veterans Court. Consequently, each court proceeded independently and without reference to what the other court was doing.

The Veterans court informed Krueger that his appeal had been docketed, and that he either must submit the filing fee or seek a waiver thereof within fourteen days. Krueger did neither. The Veterans Court, after issuing an order to show cause why the appeal should not be dismissed, to which Krueger again did not respond, dismissed Krueger's appeal in November 2000.

Following further proceedings in this court, we treated Krueger's notice of appeal as a petition for mandamus. On December 4, 2000, we ordered the Veterans Court to consider whether Krueger's first letter (dated July 3, 2000) had been timely notice of appeal of the Board's April 18, 2000 decision.

The Veterans court then noted that the two courts had been acting in ignorance of the other's actions. It held that because it had accepted Krueger's second letter as a timely notice of appeal and docketed (but later dismissed) the appeal, Krueger's petition for relief was moot, and dismissed it. That order, dated April 25, 2001, is the subject of the present appeal.

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II

The jurisdiction of this court to review decisions of the Veterans Court is limited to challenges to "the validity of any statute or regulation...or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision." 38 U.S.C. § 7292(a) (Supp. 2001). Except for constitutional issues, however, we cannot review "(A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2)(1988).

As noted, Krueger's appeal is from the Veterans Court order of April 25, 2001, which dismissed his petition for relief as moot. The validity of that decision turns on (1) whether there remained a live controversy over the validity of Krueger's July 3, 2000 letter as a valid appeal, light of that court's acceptance of

Krueger's July 28, 2000 letter, as a timely appeal from the Board decision, and (2) whether this court's writ of mandamus required the Veterans Court to determine the validity of that earlier letter as an effective appeal. These issues involve factual determination relating to this particular case and section 7292 denies us jurisdiction to decide them. We therefore dismiss the appeal.

Pl.Exh. No. 2

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Courts of Appeals for the Federal Circuit

00-7156

WILSON M. KRUEGER, JR.,

Claimant-Appellant,

v.

HERSHEL W. GOBER,
Acting Secretary of Veterans Affairs,

Respondent-Appellee

Before NEWMAN, LOURIE, and LINN, Circuit Judges.

LOURIE, Circuit Judge.

ORDER

Wilson M. Krueger and the Acting Secretary of Veterans Affairs respond to this court's

September 29, 2000 order.

Pl.Exh. No. 3

Krueger states that he is seeking review of a July 10, 2000 letter from the clerk of the Court of Appeals for Veterans Claims returning without action what Krueger considered to be a notice of appeal. In that letter, the clerk treated Krueger's submission as a request to reopen his claim and informed Krueger that he must submit his request in the first instance to the VA regional office. Krueger states that his July 3, 2000 submission to the Veterans Court was not a request to reopen a claim but rather was a notice of appeal from an April 18, 2000 decision of the Board of Veterans' Appeals (Board case no. 98-11982).

The Acting secretary responds that this court does not have jurisdiction to review the clerk's July 10, 2000 letter because that letter is not a decision of the United States Court of Appeals for Veterans Claims. The Acting Secretary states, however, that he does not oppose treating Krueger's notice of appeal as a petition for writ of mandamus, and he asserts that under the circumstances, limited mandamus relief may be appropriate.

We agree with the Acting Secretary. While this court does not have jurisdiction to review the clerk's letter, see 38 U.S.C. § 7292(a), we treat Krueger's submission as a petition for a writ of mandamus to direct the United States Court of Appeals for Veterans Claims to consider whether his July 3, 2000 decision of the Board of Veterans' Appeals. We grant the petition.

Accordingly,

IT IS ORDERED THAT:

(1) Krueger's notice of appeal, construed as a petition for a writ of mandamus, is granted. The Court of Appeals for Veterans Claims is directed to consider whether Krueger's July 3, 2000 submission to that court was sufficient to timely appeal the April 18, 2000 decision of the Board of Veterans' Appeals.

00-7156

(2) Each side shall bear its own cost.

FOR THE COURT

DEC –4 2000
Date

(signed)
Alan D. Lourie
Circuit Judge

cc: Wilson M. Krueger, Jr.
Virginia G, Farrier, Esq.

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FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

DEC – 4 2000

JAN HORBALY
CLERK

00-7156

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

01-7067

WILSON M. KRUEGER, JR.,

Claimant-Appellant,

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs,

Respondent-Appellee.

ORDER

Pl.Exh. No. 4

United States Court of Appeals for the Federal Circuit

ORDER

Before NEWMAN, Circuit judge, FRIEDMAN, Senior Circuit judge, and RADER, Circuit Judge.

A petition for rehearing having been filed by the APPELLANT,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on January 24, 2002.

FOR THE COURT,
(signed)

Jan Horbaly
Clerk

Dated: January 17, 2002

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
JAN 17 2002
JAN HORBALY
CLERK

cc: Wilson M. Krueger, Jr.
Virginia G. Farrier

KRUEGER V DVA, 01-7067
(CVA – 01-1)

Pl.Exh. No. 4

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Note: Pursuant to Fed. Cir. R, 47.6, this order is not citable as precedent. It is a public record

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Pl.Exh. No. 4

Riverview Clinic

580 N. Washington Street
Janesville WI, 53547-0551
608-755-3500 * 800-779-2854

June 26, 1996

Mr. Wilson Krueger, Jr.
W1343 Brooklyn-Albany Road
Albany, WI 53502

Dear Mr. Krueger

I reviewed the VA records that you brought with your appointment at your request.

As you know, our concern is to determine whether the blood pressure elevation that you have suffered was a Service-connected or Service-related illness.

The blood pressure measurements recorded between December 1969 and June 1974 (your DOS) indicate that during the time of your Military Service, specifically between 1969 and 1974, that elevated blood pressure was present. Theoretically one could claim that your blood pressure was elevated before Military Service, but I presume that would have been detected in your Military Examination at the time of Military Enrollment

To summarize, my review of the extensive records that you brought here reveal that your blood pressure was, as far as we can tell, normal at the tone you enrolled in the Military and was elevated on several occasions during your Military Service and therefore was a medical condition that was present at the time of discharge from Military Service. Therefore, in my opinion, it is more likely than not that the onset of high blood pressure took place in Military Service.

If there is any further question about this issue, please give me a call.

Sincerely,

(signed)

Daniel T. Peterson, M.D.

DTP:rw

Pl. Exh. No. 5